

NOT TO BE INCLUDED
IN BOUND VOLUMES

PBH
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLOUGHERTY PACKING LLC,
d/b/a FJ FOODSERVICE
Employer

and

Case 21-RC-21310

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 770, UNITED
FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections to an election held on August 26, 2011, and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 66 for and 63 against the Petitioner, with two void ballots.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the Acting Regional Director's findings and recommendations, and finds that a certification of representative should be issued.¹

¹ Chairman Pearce and Member Becker adopt the Acting Regional Director's overruling of the Employer's objections in their entirety. Contrary to the dissent's implication, Employer's Objection 2 does not allege that the use of employees' photographs was objectionable. As the matter was not alleged, argued, or considered during the investigation, and was not raised in the Employer's exceptions, it is neither material nor surprising that the record is silent as to whether employees specifically consented to the use of their photographs. Further, Member Hayes would direct a hearing that the Employer does not presently seek. The Acting Regional Director declined to direct a hearing on any of the objections before us and the Employer does not except or argue that a hearing is required. Accordingly, Chairman Pearce and Member Becker find it unnecessary to consider the matters not raised by any party in this proceeding. In any event, the Employer, as the objecting party, bore the burden of proof, and thus of coming forward with evidence

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Food and Commercial Workers Union Local 770, United Food and Commercial Workers International Union, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees, shipping and receiving employees, and sanitation employees employed by the Employer at its operations located at 3883 South Soto Street, Los Angeles, California, excluding all other employees, office clerical employees, quality assurance employees, sales employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

to justify a hearing, on the issues discussed by Member Hayes, and the Regional Director correctly found that it failed to carry that burden.

Member Hayes would remand Employer Obj. 2 for a hearing. The objection alleges that the Petitioner, without obtaining the consent of affected employees, distributed a flyer which contained the names and purported signatures of approximately 84 of the 138 unit employees and represented that the named employees were voting for the Union and urged other employees to join them. The flyer also included photographs of eight unit employees. Absent evidence that the employees consented to the use of their photographs in the Union's flyer, Member Hayes would find that its distribution was contrary to the principles set forth in *Allegheny Ludlum Corp.*, 333 NLRB 734, 743-745 (2001), *enfd.* 301 F.3d 167 (3d Cir. 2002) (prohibiting use of employees' images in campaign propaganda unless employees voluntarily consented to be included). In Member Hayes' view, those principles apply with equal force to employers and unions. He would include in the remand the question whether the use of employee signatures in the flyer likewise was objectionable under this standard. See also his dissents in *Enterprise Leasing Co.—Southeast LLC*, 357 NLRB No. 159 (2011) and *Somerset Valley Rehab & Nursing Center*, 357 NLRB No. 71 (2011). Member Hayes construes Employer Obj. 2 to encompass the use of the photographs in the flyer in the circumstances present here, where the Board had not previously decided the applicability of *Allegheny Ludlum* to union election conduct, and similarly finds that the Employer's exceptions to the overruling of its objections should reasonably be read to contemplate a hearing to establish the facts regarding the issue of consent.